Vet. App. No. 15-2987

IN THE UNITED STATES COURT OF APPEALS
FOR VETERANS CLAIMS

ERIC R. WELSH,

Appellant,
v.
ROBERT A. MCDONALD,

Secretary of Veterans Affairs,
Appellee.

ON APPEAL FROM THE
BOARD OF VETERANS' APPEALS

BRIEF OF THE APPELLEE SECRETARY OF VETERANS AFFAIRS

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ISSUES PRESENTED

Whether the Court should vacate and remand the portion of the June 18, 2015, Board of Veterans' Appeals (Board) decision, which denied entitlement to a rating in excess of 10 percent for residuals of a fracture of the right tibia.

Whether the Court should affirm the portion of the June 18, 2015, Board decision which denied a compensable rating for residuals of a stress fracture of the distal left tibia; a rating in excess of 10 percent for residuals of a stress fracture of the second and third metatarsals of the right foot; and a rating in excess of 10 percent for residuals of a stress fracture of the second and third metatarsals of the left foot.

STATEMENT OF FACTS

The Veteran served on active duty from January 1994 to April 1996. [R. at 56] (DD Form 214). In October 1996, Appellant filed a Department of Veterans Affairs (VA) claim for entitlement to service connection for his right tibia. [R. at 380-383]. A December 1996 rating decision granted entitlement to service connection for fracture of the right tibia, bilateral stress fractures of the second and third metatarsals of the feet, and left tibia. [R. at 365-368]. A noncompensable rating was assigned for each disability. Appellant did not appeal this decision.

In September 2003, Appellant sought an increased disability rating. [R. at 363]. He was provided a VA examination in December 2003 [R. at 333-334], and as a result, a January 2004 rating decision continued a noncompensable disability rating for each of the disabilities. [R. at 321-327]. Appellant did not appeal this decision.

Appellant again requested increased disability ratings in November 2010. [R. at 318]. He was provided a VA examination in January 2011 [R. at 281-290], and as a result, a September 2011 rating decision granted entitlement to a 10 percent disability rating for residuals of right tibia fracture, and continued the noncompensable rating for the other disabilities. [R. at 235-244]. In July 2012, Appellant filed a Notice of Disagreement (NOD) as to all claims. [R. at 230].

As a result, Appellant was provided a VA examination in January 2014. [R. at 197-224]. The examiner diagnosed fracture right tibia with small accessory ossicle. [R. at 197, (197-224)]. Appellant reported flare ups of pain in the right ankle 2-3 times per month which caused difficulty walking. [R. at 198, (197-224)]. Range of motion of right ankle plantar flexion was 30 degrees with painful motion beginning at 30 degrees. *Id.* Range of motion of right dorsiflexion right ankle was 15 degrees with painful motion beginning at 15 degrees. [R. at 198-199, (197-224)]. Left ankle range of motion was normal for both plantar and dorsiflexion without any painful motion. [R. at 199, (197-224)]. Appellant was able to perform repetitive testing without decrease in range of motion of either ankle. *Id.* The examiner found no functional loss of the left lower extremity. [R. at 200, (197-224)]. The right lower extremity was noted to have less movement than normal, weakened movement, and pain on movement. *Id.* The examiner stated that Appellant had 5 degrees of additional loss of range of motion due to pain, weakness, fatigability, or incoordination of the right ankle during flare ups. *Id.* He also had localized tenderness or pain on palpitation of the right ankle. [R. at 200-201, (197-224)]. Muscle strength testing showed 5 out of 5 for left ankle and 4 out of 5 for the right ankle. [R. at 201, (197-224)]. There was no laxity or ankyloses of either ankle. *Id.* The examiner noted shin splints of the left tibia. [R. at 202, (197-224)]. The examiner noted the functional impact of the ankle

disabilities resulted in inability to climb and difficulty with prolonged running. [R. at 205-224)].

Regarding the feet, the examiner diagnosed moderate stress fractures of the metatarsals resolved with residual pain. [R. at 208, (197-224)]. Imaging studies revealed no abnormalities of either foot. [R. at 212, (197-224)]. The examiner noted abnormal gait with slight limp. [R. at 213, (197-224)].

The examiner also diagnosed stress fracture left tibia, resolved, and bilateral shin splints. [R. at 214-215, (197-224)]. The examiner noted flare ups that occurred a few times per year as a result of running. [R. at 216, (197-224)]. Bilateral knee flexion was normal without objective evidence of painful motion. *Id.* There was no limitation of extension and no objective evidence of painful motion. *Id.* Appellant was able to perform repetitive motions without limitation of motion or objective evidence of painful motion. [R. at 217, (197-224)]. There was no functional loss or impairment of either knee. [R. at 218, (197-224)]. A Statement of the Case (SOC) was issued later in January 2014 [R. at 178-196], and Appellant perfected his appeal in March 2014. [R. at 176].

A January 2015 rating decision increased the bilateral foot awards to 10 percent each. [R. at 28-32]. A Supplemental SOC (SSOC) was issued later that same month. [R. at 38-53].

The Board found the preponderance of the evidence against an increased disability rating for the claims. [R. at 1-18]. This appeal ensued.

A. THE COURT SHOULD VACATE AND REMAND THE PORTION OF THE BOARD'S DECISION THAT DENIED ENTITLMENT TO A HIGHER RATING FOR RIGHT TIBIA DISABILITY BECAUSE THE BOARD FAILED TO PROVIDE ADEQUATE REASONS OR BASES FOR ITS DETERMINATIONS.

The Secretary concedes remand is warranted in order for the Board to provide adequate reasons or bases for its determinations regarding Appellant's right tibia. The Board must provide a statement of reasons or bases that is adequate to enable an appellant to understand the precise basis for its decision as well as to facilitate review in this Court. To comply with this requirement, the Board must analyze the credibility and probative value of the evidence, account for the evidence it finds persuasive or unpersuasive, and provide the reasons for its rejection of any material evidence favorable to the claimant. 38 U.S.C. § 7104(d)(1); *Buczynski v. Shinseki,* 24 Vet.App. 221, 224 (2011).

According to 38 C.F.R. § 4.71a, Diagnostic Code (DC) 5270, a 10 percent disability rating is warranted for plantar flexion less than 30 percent, and a 20 percent disability rating is warranted for plantar flexion between 30 and 40 percent or dorsiflexion between 0 and 10 degrees. 38 C.F.R. § 4.71a, DC 5270. DC 5271 provides a 10 percent disability rating is warranted for moderate ankle limitation of motion, and a 20 percent disability rating is warranted for marked ankle limitation of motion. 38 C.F.R. § 4.71a, DC 5271.

In *DeLuca v. Brown,* the Court determined that 38 C.F.R. §§ 4.40 and 4.45 require that the disabling effects of painful motion must be considered when rating joint disabilities. 8 Vet.App. 202, 205–206 (1995). Therefore, a claimant may be entitled to a higher disability evaluation than that supported by mechanical application of relevant DCs where there is evidence that the disability causes functional loss such as "the inability ... to perform the normal working movements of the body with normal excursion, strength, speed, coordination[,] and endurance," including as due to pain. 38 C.F.R. § 4.40. A higher disability evaluation may also be awarded where there is a reduction of a joint's normal excursion of movement in different planes, including changes in the joint's range of movement, strength, fatigability, or coordination. 38 C.F.R. § 4.45.

The Board determined that a January 2014 VA examination was adequate for rating purposes and that the January 2014 VA examiner did not find any additional limitation of motion. [R. at 5, 8, 10, (1-18)]. However, after recording range of motion measurements for the right ankle, the examiner noted Appellant had an additional loss of motion of 5 degrees in range of motion during flare ups. [R. at 200, (197-224)]. Remand is required in order for the Board to address this additional loss of range of motion. 38 U.S.C. § 7104(d)(1); *Buczynski v. Shinseki,* 24 Vet.App. at 224.

Regarding Appellant assertions that the VA ankle examination is inadequate because it did not conduct full range of motion testing for both

passive and active motion, he has not demonstrated that the examination did not include both range of motion testing. [Appellant's Brief (App.Br) at 7]. The duty to assist includes the duty to conduct an adequate medical examination. 38 U.S.C. § 5103A; *Stefl v. Nicholson,* 21 Vet.App. 120, 123 (2007). An adequate examination is based upon the veteran's prior medical history and examinations, and describes the disability in sufficient detail so that the Board can provide a fully informed evaluation of the claimed disability. *Barr v. Nicholson,* 21 Vet.App. 303, 311 (2007).

Here, the examination report shows the examiner measured Appellant's flexion, extension, right-lateral flexion, left-lateral flexion, noted painful motion during each test, performed repetitive use testing, and addressed whether there was functional loss, functional impairment, weakness, fatigability, incoordination, swelling, deformity, atrophy, instability, disturbance of locomotion, and interference with sitting, standing, or weight-bearing. [R. at 197-224]. Appellant failed to show that the examiner did not include both active and passive ranges of motion in the examination or that such testing was possible, and otherwise has not carried his burden of demonstrated the VA examination report failed to provide all necessary information for the Board to decide the claim.

The Secretary is aware of the Court's decision in *Correia v. McDonald,* 28 Vet.App. 158 (2016); however, the Secretary is currently seeking panel reconsideration of that decision and, in the alternative, full Court review. The

Secretary has argued that "the Court replaced the Secretary's interpretation of the last sentence of 38 C.F.R. § 4.59—which it conceded was both reasonable and not inconsistent with the ordinary meaning of the terms used in the regulation—with one that, by comparison, not only strained the ordinary meaning of the regulation's words but forced the Court to add language to the relevant provision in order to make the interpretation workable." *See, Correia,* Vet.App. No. 13-3238 (Motion of Appellee for review en banc, filed September 5, 2016). The Secretary cannot and will not take a contrary position in the present case given that proceedings continue in *Correia*. The present case perfectly illustrates the chilling effect upon possible joint dispositions highlighted by the Secretary in his motion for reconsideration. *See Id.* at 2, n.1 (stating "The Secretary's ability to offer and agree to joint remands would be affected out of an abundance of caution that any misstatement or strategic compromise as to the proper interpretation of the law might be used against him in the future."). Any concession by the Secretary in the present case, even to have the Board consider whether additional testing were possible, as described in this Court's decision in *Correia*, could be used against the Secretary, to include in any forthcoming decision for reconsideration or full Court review in *Correia*. The chilling effect of the Court's use of joint motions for remand premised on a inadequate statement of Board reasons-or-bases as somehow constituting the

considered position of the Secretary on all matters of regulatory or statutory interpretation simply cannot be overstated.

B. THE COURT SHOULD AFFIRM THE PORTION OF THE BOARD'S DECISION THAT DENIED ENTITLEMENT TO AN INCREASED DISABILTY RATING FOR THE LEFT TIBIA, AND BOTH FEET BECAUSE THERE IS A PLAUSIBLE BASIS FOR THE BOARD'S DETERMINATIONS AND APPELLANT FAILED TO DEMONSTRATE PREJUDICIAL ERROR.

The Court should affirm the Board's decision because there is a plausible basis for the Board's determinations and Appellant has not demonstrated the Board's decision is clearly erroneous or the result of prejudicial error. *Shinseki v. Sanders*, 556 U.S. 396, 409 (2009) (Appellant bears the burden of demonstrating prejudicial error); *Hilkert v. West,* 12 Vet.App. 145, 151 (1999) (en banc).

VA's schedule of disability ratings is based on the average impairment in earning capacity in civil occupations from specific injuries or combinations of injuries. 38 U.S.C. § 1155; 38 C.F.R. § 3.321(a). In exceptional cases where the schedular evaluations are found to be inadequate, an extraschedular evaluation for impairments that are due to service-connected disability or disabilities may be awarded. 38 C.F.R. § 3.321(b)(1). Determining whether an extraschedular evaluation is warranted involves a three-step process. *Thun v. Peake*, 22 Vet.App. 111, 115 (2008), *aff'd sub nom. Thun v. Shinseki*, 572 F.3d 1366 (Fed. Cir. 2009). First, the Board must determine whether the evidence "presents such

an exceptional disability picture that the available schedular evaluations for that service-connected disability are inadequate." *Id.* if so, the Board must determine whether the veteran's exceptional disability picture exhibits other related factors such as "marked interference with employment" or "frequent periods of hospitalization." *Id.* at 116; *see* 38 C.F.R. § 3.321(b)(1)). If both these inquiries are answered in the affirmative, the Board must refer the matter to the Under Secretary for Benefits or the Compensation Service Director for a determination of whether, "[t]o accord justice," the veteran's disability picture requires the assignment of an extraschedular evaluation. *Id.* In making the extraschedular referral determination, the Board must consider the collective impact of multiple service-connected disabilities whenever the issue is expressly raised by the claimant or reasonably raised by the evidence of record. *Yancy v. McDonald*, 27 Vet.App. 484, 495 (2016).

Appellant argues the Board provided inadequate reasons or bases as to its extraschedular determination. [App. Br. at 10]. He incorrectly contends the Board made found that all forms of employment must be precluded to warrant extraschedular rating referral. *Id.* Instead, the Board considered Appellant's symptoms and found that they were contemplated by the schedular rating and referral for extraschedular consideration was not warranted. [R. at 15-16, (1-18)]. In other words, the Board found that Appellant's symptoms did not meet the first "threshold" requirement for extraschedular consideration under *Thun,* i.e.,

"an exceptional disability picture that the available schedular evaluations for that service-connected disability are inadequate." *Thun*, 22 Vet.App. at 115. Appellant has not pointed to any symptoms that are not contemplated by the schedular rating criteria that the Board failed to consider. Nor has he explained how his symptoms are exceptional or unusual.

After finding that Appellant's symptoms were contemplated by the rating schedule's diagnostic code, the Board then acknowledged that various VA examiners stated Appellant's lower extremity disabilities did not prevent all forms of employment and Appellant was still capable of sedentary employment. [R. at 16, (1-18)]. This factually correct statement was simply made in addition to the fact that Appellant's symptoms were contemplated by the rating code. The Board's reasons or bases are adequate because it determined Appellant simply did not meet the first requirement under *Thun*, i.e. "an exceptional disability picture that the available schedular evaluations for that service-connected disability are inadequate." *Thun*, 22 Vet.App. at 115.

CONCLUSION

Appellant waives any arguments not raised in his principal brief. *Cacciola v. Gibson,* 27 Vet.App. 45, 57 (2007). The Secretary herein responds to the arguments Appellant, through her attorney, actually argued. As to the right tibia claim, the Court should vacate and remand the claim because the Board provided inadequate reasons or bases for its determinations. As to the left tibia

and bilateral foot claims, Appellant has not met his burden of demonstrating prejudicial error. The Court should affirm the Board decision because Appellant has not demonstrated that it is clearly erroneous. *Shinseki v. Sanders,* 556 U.S. at 409; *Hilkert West,* 12 Vet.App. at 151.

Respectfully submitted,

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